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No. 42

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

THE PITTSBURGH STEAMSHIP COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE RESPONDENT

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BRIEF OF THE RESPONDENT

Opinions Below

The opinion of the Court of Appeals on the first review is reported in 167 F. 2d 126. The opinion of the Supreme Court remanding the cause to the Court of Appeals for further consideration by it is reported in 337 U.S. 656. The opinion of the Court of Appeals on the remand (R.870-884) is reported in 180 F. 2d 731.

Jurisdiction

The judgment of the Court of Appeals was entered February 17, 1950 (R. 868). The petition for a writ of certiorari was granted on May 8, 1950 (R. 886). The

jurisdiction of this Court is invoked under Section 1254 of 28 U.S.C., as codified June 25, 1948.

Questions Presented by the Petition

1. "Whether the scope of judicial review of findings of fact made by the National Labor Relations Board has been changed by the Administrative Procedure Act or the Labor Management Relations Act".

2. If that question is answered in the affirmative, "whether the Board's findings are supported by substantial evidence on the record considered as a whole".

3. If the answer to the first question is in the affirmative, "whether the scope of judicial review is so 'broadened' as to permit a court to substitute its own findings and inferences for the reasonable findings and inferences of the Board".

4. "Whether procedural changes made by the Administrative Procedure Act and the Labor Management Relations Act which govern the admissibility of evidence in proceedings before the Board and the standards to be adopted by the Board in making decisions apply to hearings concluded and decisions made by the Board prior to the effective date of these statutes".

The foregoing are the questions as stated in the petition for certiorari, the second and third in a footnote.

The Petitioner now states three main questions and five questions subsidiary to the third, which is "whether the Board's findings are supported by substantial evidence on the record considered as a whole" (Br. p. 2).

As we shall later show, none of the five subsidiary questions nor the first of the main questions, as now stated by the Petitioner, are presented by the record.

The Court of Appeals did not apply either of said Acts retroactively, it did not decide the case on the credibility of witnesses or resolve conflicts in the testimony, it did not decide that the Respondent is not "responsible for unfair labor practices committed by the chief officers on

its ships", it did not decide that the Respondent "can escape responsibility because the evidence related only to seven out of seventy-three ships", it did not deny enforcement because the Board relied upon "incompetent or hearsay evidence".

Throughout its brief the Petitioner disregards the charge and the ultimate conclusion of fact upon which the Board's order rests, namely, that the Respondent engaged in a "planned" and "integrated" course of coercive conduct to defeat the Union in the election (R. 4, 824, 828, 830).

The decisive question in the case is whether there is substantial evidence on the record considered as a whole that the Respondent planned and engaged in a course of coercive conduct to defeat its employees' right of self-organization.

We shall deal with that question first.

Statutes Involved

The pertinent provisions of the Administrative Procedure Act (60 Stat. 237, 5 U.S.C. § 1001 *et seq.*) and of the Taft-Hartley Act—Labor Management Relations Act, 1947—(61 Stat. 136, 29 U.S.C. Supp. I, § 141 *et seq.*) are as follows:

Administrative Procedure Act:

> "Section 10. [5 U.S.C.A. § 1009]. *Judicial review of agency action*—
>
> • • • • •
>
> "(a) *Right of review*—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.
>
> • • • • •
>
> "(e) *Scope of review*—• • • the reviewing court shall • • • (B) hold unlawful and set aside agency action, findings, and conclusions found to be • • • (5) unsupported by substantial evidence • • •" and in making that determination shall "review the whole record • • •".

Taft-Hartley Act:

"Section 8. [29 U.S.C.A. § 158]. * * *

"(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

"Section 10. [29 U.S.C.A. § 160]. * * *

"(b) * * * Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to sections 723b and 723c of Title 28."

"(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: * * * If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. * * *"

* * * * *

"(e) * * * The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive".

Statement of the Prior Proceedings

On December 15, 1943, the Respondent consented to an election on its seventy-three ships to determine whether its 2,000 unlicensed employees should be represented by the National Maritime Union (R. 757). The navigation season on the Great Lakes opened the following April and the election was conducted on each ship under the direction and supervision of the Petitioner between June 6 and 15, 1944 (R. 802).

The election went against the Union, but there were 720 votes for it. No complaint was made to the Respondent at the time of any coercive or anti-Union conduct and no objection was made to the Board, which certified the result (R. 761).

More than a year later and on July 10, 1945, the Petitioner issued its complaint charging unfair labor practices and that the Respondent had, from on or about December 15, 1943, to on or about June 17, 1944 "engaged in a plan and continuous course of conduct" which had "interfered with, restrained and coerced its employees in the exercise of their rights guaranteed them in Section 7" of the National Labor Relations Act and that one Shartle had been discharged for Union activities (R. 4-5).

After a long trial, the Examiner submitted his report and findings (R. 799-842). He found "that during the 1944 sailing season, the Respondent, through its agents, engaged in a course of conduct violative of the Act. Although the Respondent's anti-Union conduct took a variety of forms, all were integrated, it is found, by a common purpose and plan—to defeat the Union in the election, and, beyond that, to discourage and frustrate the organizational efforts of the Union" (R. 823-4), that expressions of Union hostility by a few Supervisors on seven ships "constituted an integral part of the Respondent's broad pattern of coercive conduct", and that "Likewise forming an integral part of the Respondent's entire course of coercive

conduct were the Ferbert letters" (R. 828), that the Respondent's instructions to the Supervisors to maintain strict neutrality should be disregarded because they "were never communicated to the employees" (R. 830) and that "It is found that the statements and acts outlined above constituted integral parts of a course of conduct, engaged in by the Respondent, which the Respondent intended should, and which in fact did, interfere with, restrain, and coerce its employees in the exercise of the rights guaranteed in Section 7 of the Act" (R. 830).

He also found that the claim of Shartle's incompetence "was merely the pretext for the discharge, and that the real reason for the discharge lay in Shartle's Union activities * * *, thereby discouraging membership in the Union, and interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act" (R. 838-9).

The Board accepted the Examiner's findings in bulk, except it found that "the Ferbert letters are not unlawful *per se*", but, as the Examiner found, that "they constitute an integral and inseparable part of the Respondent's otherwise illegal course of conduct and when so viewed they assume a coercive character * * *" (R. 855).

The Board did not, as the Petitioner says (Br. p. 27), "agree[d] with the Trial Examiner as to the import of the 'Ferbert letters', finding that, although they were not unlawful *per se*, when considered in the context of the Company's other illegal acts and statements they 'assume[d] a coercive character which is not privileged by the right of free speech' ".

On the contrary, the Board flatly rejected the Examiner's premise that the letters were unlawful *per se*, but adopting his conclusion based thereon, it found, as above, that "so viewed", i.e., as an integral part "of otherwise unlawful conduct", they assume a "coercive character".

On the first review of the Board's order, the Court of Appeals denied enforcement on the ground that it was based on a decision which "lacks all semblance of fair judicial determination" (R. 872). It said that "the un-

varying repudiation of every witness for the petitioner * * * along with the consistent exaltation of every union witness * * * destroys completely any confidence that might otherwise be placed in the findings of the trial examiner and stamp[s] them as arbitrary" (337 U. S. 656, 658).

This Court reversed, saying: "We are constrained to reject the Court's conclusion that an objective finder of fact could not resolve all factual conflicts arising in a legal proceeding in favor of one litigant" (*id.* 659).

It refused the Board's request to remand the cause "with instructions to enforce the Board's order", but did remand it for the Court of Appeals to consider the "applicability and possible effect of" said statutes (*id.* 661-2).

The Court of Appeals assumed that this Court did not intend it "to pass upon that question *in vacuo*" (R. 877). It reviewed the whole record with unusual care, thoroughness and accuracy and its final conclusion was that to hold that the Respondent "engaged in a general course of anti-Union conduct is to ignore the mandate of the two statutes that decision shall be based upon 'the record considered as a whole' " (R. 877-884).

It specifically found that the finding of the Examiner that the Ferbert letters "formed an integral part of a general course of coercive conduct", is "supported by no evidence" (R. 878) and that the finding that Shartle "was discharged because of Union activity is not supported by reliable, substantial and probative evidence" (R. 882). Shartle gave hearsay testimony that he was assured by a number of his shipmates, in response to his statement to them that he "was being fired for being incompetent", that he was not incompetent but must have been discharged for Union activity (R. 173). That is the sole evidence in support of the finding of the Examiner.

Facts

We were at war. The Respondent was attempting to transport all the iron ore that it could from the upper

lake ports in aid of the war effort. Naturally, it was anxious to avoid any conflict with the N.M.U. and took particular pains not to give it any excuse for a work stoppage.

This Court said on the former review that there was testimony "tending to show that it had strictly enjoined its licensed personnel to remain wholly neutral in the weeks leading up to and including the Board election" (337 U. S. 656, 657-8).

In fact, the undisputed testimony of several witnesses was that at the customary meeting of the Masters and Chief Engineers just before the navigation season opened, Mr. Ferbert, the Respondent's President, informed them of the prospective election and positively instructed them that they must maintain strict impartiality and must not interfere with any Union activities as long as they did not interfere with discipline or proper operation (R. 361, 484, 552, 666, 678).

Those verbal instructions were confirmed by letters to the Masters instructing them to cooperate with the Board and saying, among other things:

> "• • • The important thing in this election is to see that everyone votes; therefore, no matter how you believe a man is going to vote, see that he remains on the ship until the representative of the National Labor Relations Board comes to conduct the election • • •.
>
> • • • • •
>
> "• • • You must see to it that whatever is addressed to the employes is delivered to them. There must be no partiality." (R. 795-6.)

The Examiner did not venture to find that those instructions, verbal and written, were not given in good faith, but declined to consider them for the stated reason that they "were never communicated to the employees" (R. 830), a ruling which the Court of Appeals correctly held was erroneous as a matter of law (R. 879).

Mr. Ferbert also took the precaution to write two letters to each of the unlicensed seamen, in which he stated certain facts respecting so-called "rotary hiring" and the freezing of wages during the war emergency and advised them that the election was solely their business, that their decision would not affect their position with the Company, that it was their duty as well as their privilege to make up their own minds after careful consideration and discussion with their fellows and to vote accordingly, in order that the will of the majority might be ascertained (Bd. Exs. 2-3, R. 743-746). He said, among other things:

> "• • • Questions such as these should be carefully thought about and discussed among you so that your selection may be an intelligent and a wise one. No one must threaten you in this election. It is your privilege to make up your own mind as to how you should vote.
>
> "One thing more • • • we are now all engaged in carrying iron ore for the war effort which we want to finish just as fast as we can. Let us allow nothing to interfere with this objective, and if the majority select the Union, let us all be bound by it and cooperate." (R. 745-6.)

It is admitted that the Union had at least one Union organizer on every ship. Three of the seven who were called as witnesses were salt-water seamen who obtained employment from the Respondent to organize its employees and, despite the war emergency, quit their jobs as soon as the election was over to return to the sea (R. 64, 242, 285). Another, Lee, had his training at sea (R. 139).

Of the 720 friendly seamen, who voted for the Union, including at least 73 partisan organizers, only four, who were not organizers, were called as witnesses, — Zmrazek (R. 41), Vogt (R. 82), Jones (R. 224), and Anderson (R. 248). The sporadic incidents to which they testified were trivial and, as appears from their own testimony, none of them thought that he was being coerced.

Vogt's testimony related to conversations with Captain Lawless on the Bunsen and the Cornell after he first entered the Respondent's employ on October 18, 1944, four months

after the election (R. 83). That certainly eliminates one of the seven ships on which isolated incidents are claimed to have occurred.

The Petitioner called only seven of at least seventy-three partisan organizers—Babin (R. 13), Weissflog (R. 53), Lee (R. 124), Shartle (R. 168), Vogel (R. 213), Herrick (R. 233) and Sims (R. 274). Shartle testified that, when his Master and First Mate told him that he was discharged for incompetence, he informed some of his shipmates, deck hands and the like, that he "was being fired for being incompetent", and that they assured him that he was not incompetent but that his discharge must be for Union activities (R. 173-4). Vogel took Shartle's place as an organizer. The Petitioner claims that he was also discharged by First Mate Dobson, who discharged Shartle. But Vogel admits that he quit his ship voluntarily at the end of a voyage and that Dobson wanted him to stay on (R. 224). They had had words about which they disagree, when Dobson overheard a quarrel between Vogel and a Union member over dues (R. 215, 504).

Herrick's testimony is so inconsequential that the Petitioner's brief does not even refer to it. Sims' testimony is equally inconsequential, though the Petitioner does refer to it (Br. pp. 12-13).

That leaves Babin, Weissflog and Lee, whom the Petitioner features (*id.* pp. 5-10).

They were the only organizers whose unionizing activities were restrained or limited in any way. All the others were left free to pursue their unionizing efforts at will.

According to the Petitioner's own evidence, the Union was permitted to conduct an aggressive unionizing campaign on the Respondent's ships for ten weeks preparatory for the election. It was permitted to post whatever it wished on the bulletin boards (R. 298-9), freely to circulate whatever literature it wished (R. 13, 796) and even to hold Union meetings on shipboard (R. 244).

That explains the paucity and inconsequential nature of the Petitioner's evidence, revealed by its own statement of facts (Br. pp. 5-27).

SUMMARY OF ARGUMENT

I. The whole record demonstrates beyond cavil or doubt that the Respondent did not plan or engage in a general course of coercive conduct to influence the election.

The finding that it did so was the ultimate conclusion of fact essential to support the order.

The testimony that the Respondent strictly enjoined the Supervisors to remain wholly neutral was undisputed (R. 361, 484, 552, 666, 678). It was confirmed by Mr. Ferbert's letter of instructions to the Masters saying, among other things, *"There must be no partiality"* (R. 796).

The Examiner did not find that those instructions were not given in good faith. Instead, he disregarded them solely on the stated ground that they were not communicated to the unlicensed seamen (R. 830).

It thus stands established as a matter of law that the instructions were, in fact, given.

Those instructions were so scrupulously observed that the Petitioner was unable to tender any criticism of a word spoken or an act done by a single Supervisor on 66 of the Respondent's 73 ships, and the incidents on one of the seven testified to occurred months after the election.

The Petitioner relied wholly on

(a) expressions of personal hostility to the Union by ten Supervisors on seven ships in arguments with Union organizers, which were denied by the Masters, Mates and Engineers involved; (b) the Ferbert letters to the unlicensed seamen; and (c) the discharge of Shartle.

(a) The only incidents of any substance aside from the discharge of Shartle involved three Union organizers on three ships and at most five Supervisors out of nearly 600.

(b) The finding of the Board itself establishes as a matter of law that the Ferbert letters were not in and of

themselves coercive or evidence of coercive conduct R. 855). They expressly and in unmistakable language informed the unlicensed seamen of their right to choose their representative without fear of reprisal or hope of favor and that *no one must threaten them in the election* (R. 745).

(c) Shartle alone out of 2,000 unlicensed seamen, including 73 organizers, was alleged to have been discharged for Union activity.

The only evidence that he was so discharged was his own hearsay testimony that his shipmates, when informed by him that he was being discharged for incompetence, assured him that he was not incompetent but must have been discharged for Union activity (R. 173). That testimony had no probative force.

It was proved and virtually found that he was incompetent (R. 836-7). He admits that that was the reason assigned for his discharge. The testimony of the Master and First Mate that they did not know when he was discharged that he was a Union organizer and that he was discharged solely for incompetence was undisputed.

The Examiner's finding that the few incidents testified to by seven Union organizers established "a pattern and a design" was erroneous as a matter of law (R. 827).

II. The Examiner and the Board committed at least five grave errors of law.

1. The Examiner disregarded the instructions to the Supervisors solely on the stated ground that they were not communicated to the unlicensed seamen.

2. He found that the fact that incidents occurred on every ship about which testimony was adduced established "a pattern and a design", although the Petitioner was only able to adduce testimony respecting a few sporadic incidents on seven ships out of 73.

3. He found that Shartle was discharged for Union

activity in the absence of even a scintilla of probative evidence to establish the fact and despite proof of Shartle's incompetence and undisputed testimony that he was discharged solely for that reason.

4. The Board adopted those findings but rejected the finding that the Ferbert letters were illegal *per se* and found that they assumed a coercive character solely because they were an integral and inseparable part of otherwise illegal conduct.

Such circuitous reasoning was erroneous as matter of law. It inferred perhaps the most important evidentiary fact from the ultimate conclusion of fact to be proved.

5. The Examiner found that the otherwise reasonable restraints imposed on Lee, Babin and Weissflog were unreasonable only because "the Respondent had no rule of general application prohibiting either solicitation or talking during working time".

So many and such grave errors were fatal to the Board's order.

III. Specifically answering Petitioner's Point III.

This is the only point under which the Petitioner attempts to deal with the merits.

It argues a number of untenable propositions which have no relation to the decisive question in the case and are not presented by either the petition or the record.

It deals scantily with the decisive question but admits that the acts relied on to show a general course of coercive conduct were found by the Board to have been done pursuant to "Company policy". Of course, that policy was not determined by the Supervisors.

IV. It is wholly immaterial whether reviewing courts possessed the inherent power which the statutes now command them to exercise.

It is now conceded that the review provisions of both Acts are applicable to this enforcement proceeding. They

require a review of the whole record in determining the sufficiency of the evidence. That is all we ask.

V. The Congress intended to and in fact did broaden the scope of judicial review by said Acts.

The Petitioner admits the intent but maintains that the Congress did not know how to effectuate that intent. It quotes the testimony of Dean Stason and Mr. McFarland before the Senate and House Judiciary Committees, respectively, as showing the true definition of substantial evidence, but the Congress adopted the changes recommended by them to make that definition effective, whereas many courts had applied it to some evidence thought to be substantial without considering how heavily such evidence was outweighed by countervailing evidence.

It suffices that the Congress has expressly commanded reviewing courts to hold unlawful and set aside agency action, findings and conclusions found to be unsupported by substantial evidence and in making that determination to review the whole record.

The Taft-Hartley Act was enacted to strengthen the review provisions of the Administrative Procedure Act in their application to the decisions of the National Labor Relations Board.

We rely on subsections (b) and (c) of Section 10 as explanatory of subsection (e) of that section. This is an enforcement proceeding subsequent to the Board's order and to the enactment of both statutes.

We claim that subsections (b) and (c) of Section 10 are to be read with subsection (e) of the same section to ascertain the meaning of the words "substantial evidence on the record considered as a whole" and that so construed those words mean the preponderating legal evidence in the record considered as a whole.

It happens that the Congress adopted the very recommendations of Messrs. McFarland, Stason and Vanderbilt to provide real judicial review without requiring the courts

to pass *de novo* on the credibility of witnesses or to resolve mere conflicts of testimony.

ARGUMENT

POINT I.

THE WHOLE RECORD DEMONSTRATES BEYOND CAVIL OR DOUBT THAT THE RESPONDENT DID NOT PLAN OR ENGAGE IN A GENERAL COURSE OF COERCIVE CONDUCT TO INFLUENCE THE ELECTION.

The finding that it did was the ultimate conclusion of fact on which the Board's order is solely based. That explains the Petitioner's strained effort to make out a general course of coercive conduct in which it admits in effect that the Board found that the acts involved were done pursuant to "Company policy" and were "in fact an integral part of a broad Company pattern (Br. pp. 125-136), although it contends that the Court of Appeals "erred in setting aside the Board's order" (*id.* p. 92) merely because of the "illegal conduct of its ship officers" (*id.* p. 120).

The Court of Appeals did not set aside the Board's order. It merely denied enforcement (R. 884) in proceedings subsequent to the proceedings resulting in that order.

Except for its lame attempt, as above, to make out a planned course of coercive conduct, the Petitioner's main reliance is on its claim of liability for isolated illegal acts or unfair labor practices committed without the Company's knowledge and contrary to its instructions to its Supervisors. We shall deal with that effort under a separate point.

1. The fact that the Respondent "strictly" enjoined its Supervisors to maintain a course of conduct of complete neutrality and non-interference with any Union activities which did not interfere with discipline or proper operation must be deemed established as a matter of law.

Not only was there testimony to that effect, as this Court said on the former review, but that testimony was

undisputed and the Examiner did not venture to find that those instructions, both verbal and written, were not given in good faith. Instead, he disregarded them for the sole reason that they were not communicated to the unlicensed seamen on the assumption "that such instructions were given" (R. 830).

As the Court of Appeals held, that was plainly an error of law.

Unlike the President of the Heinz Company (311 U. S. 514), Mr. Ferbert was not informed by the Union of the few incidents now complained of. Obviously, the Union did not deem them of sufficient consequence at the time of their commission to lodge a complaint with the Company. He had no reason to inform the unlicensed seamen of the instructions to their Supervisors. His instructions were given before the opening of navigation and later confirmed by letter. He had the right to assume that those instructions would be observed, as they were — indeed so scrupulously that not a word of criticism has been heard of a single word spoken or a single act done by a single Supervisor on 66 of the 73 ships, and the only incidents of any consequence are narrowed down to three particularly offensive and aggressive Union organizers and five Supervisors on three ships.

As the Petitioner says, Lee, Babin and Weissflog were directed not to importune the men when on watch, in the mess-hall or the men's sleeping quarters, or to an extent that caused seamen to quit their jobs. A rule of general application imposing such restraints on all Union organizers would have been reasonable. The Examiner so assumed, for he found that the restraints imposed on Lee, Babin and Weissflog were unreasonable solely because "the Respondent had no rule of general application prohibiting either solicitation or talking during working time" (R. 825-6).

That was a manifest error of law. It would have been unreasonable and wholly impracticable to attempt to prevent sailors from talking during working time.

A general rule imposing restraints on all Union organizers like those imposed on only three would have been reasonable but might have aroused antagonisms and caused conflicts. Instead, the restraints were imposed on all the Supervisors by a general rule, which enjoined strict neutrality and non-interference with any Union activities which did not interfere with discipline or proper operation. Necessarily the Supervisors had to decide when discipline and proper operation required some restraint on particular organizers.

The result was that all but three Union organizers were left free to pursue their unionizing efforts at will. No incidents serious enough to be reported to the Respondent and no work stoppages occurred during a ten-weeks' unionizing campaign participated in by professional organizers on 73 ships scattered over the Great Lakes.

That is an amazing fact in proof of the wisdom and effectiveness of Mr. Ferbert's instructions to the Supervisors.

Moreover, he did take the precaution fully to inform the unlicensed seamen of their rights and duties and that no one, neither Supervisors nor Union organizers, must threaten them.

The Petitioner is even forced to argue (Br. p. 131) that that may have been understood as referring only to Union organizers! It is the counterpart of the explicit instructions to the Masters that "There must be no partiality".

Mr. Ferbert was undoubtedly moved by the war emergency to take those precautions as his letter to the men plainly shows (R. 745-6).

The Examiner was fully aware of the fatal gap in the Petitioner's case and undertook to bridge it in characteristic fashion. Referring to what he called the "verbal attacks" of Supervisors, he found:

> "Their coincidence in point of timing with a crucial period of union organization and their occurrence on every ship about which testimony was adduced disclose both a pattern and a design. Whether, standing alone, the verbal attacks assumed a character of coer-

cion so as to remove them from the immunized area of free expression, it is not necessary here to decide. In assessing their full import they must be considered, as they are here, in context with accompanying events which provided the setting—the respondent's entire course of anti-union conduct, including the threats, the acts of intimidation and discrimination, and the restraints imposed upon union organizers, all as outlined above. So viewed, it is found, the supervisors' statements, herein characterized as verbal attacks, constituted an integral part of the respondent's broad pattern of coercive conduct.". (R. 827-8.)

That was another vital error of law.

The very fact that so few incidents occurred during a "crucial period of Union organization for ten weeks" and that the Petitioner was only able to adduce any testimony about a few sporadic incidents on seven ships out of 73 proved the very opposite of pattern and design.

The Examiner found that a few exceptions were the rule.

The Petitioner attempted to excuse the paucity of its evidence on the former review by asserting that many of its witnesses were scattered over the High Seas and unavailable. It was pointed out that that was an admission of the employment by the Union of professional organizers.

It now says that "potential witnesses were scattered and unable to appear" and that their testimony would have been "merely cumulative" (Br. p. 137). It ignores the fact that it had to prove system, "a pattern and a design", "a plan and continuous course of conduct".

It could not substitute for proof an excuse for the lack of it.

The salt-water seamen, the professionals, were not scattered over the High Seas until after the elections were held. It admits that it had "about a year and a half" to procure witnesses. It had the active assistance of the Union which participated in the trial and, of course, knew where its members were. It could have granted itself more time, if needed, to procure the testimony of absent

witnesses. But it made no suggestion of a continuance for the purpose. It has to stand or fall on the case which it made.

Moreover, it had 720 potential witnesses who were friendly to prove a system and planned course of conduct. At least 73 of them were partisans.

It must be presumed that those not called would not have supported its case, but we do not rely on presumptions. We rely on the lack of proof.

2. In his preliminary statement on the former review, the late Mr. Justice Rutledge, speaking for the Court, said that there was "testimony tending to show" three facts, which may have been deemed evidentiary of the ultimate conclusion of fact, not mentioned, which was essential to support the Board's order (337 U. S. 657).

In fact, the Board's ultimate conclusion of fact was based wholly on those three supposed evidentiary facts.

A. *One of them was that certain of the Respondent's licensed personnel expressed to unlicensed personnel bitter hostility to the Union.*

No question of the credibility of witnesses is involved on this review. We assume that the testimony of the Union organizers was true, although it was far outweighed by that of the few Masters, Mates and Engineers involved.

On the whole record, it conclusively appears that such expressions by a few Supervisors in arguments with Union organizers are wholly inadequate to establish a planned and continuous course of coercive conduct or to overcome the force and effect of Mr. Ferbert's strict instructions to the Supervisors, which on this record stand established as a matter of law.

That is so even though we accept at its face the Petitioner's statement of facts at pages 5 to 29 of its brief.

No Union organizer claims that he was caused to relax his unionizing efforts in the slightest respect. No unlicensed seaman claims that he was coerced. The reasonable restraints imposed on three particularly aggressive and

offensive Union organizers were not coercive, and, even if they were, they do not even tend to establish a general course of coercive conduct.

We have already shown that the Petitioner's statement includes incidents of no probative effect whatever on the question of a general course of coercive conduct. It was evidently impelled by the paucity of its evidence even to include alleged statements of Captain Lawless made months after the election as evidence of coercive conduct to influence the election.

The whole record conclusively disproves the other two evidentiary facts, which the learned Justice said there was testimony tending to show and which the Petitioner includes in its statement of coercive acts, and that so far from being coercive the Ferbert letters prove Mr. Ferbert's precautions to insure a fair and free election and to avoid any excuse for a work stoppage, and that Shartle was discharged solely for incompetence.

B. *It was established as a matter of law by the ruling of the Board itself that the Ferbert letters were not coercive in and of themselves and thus were not evidence of otherwise coercive conduct.*

The Board rejected the Examiner's premise that the letters were coercive by finding that they "are not unlawful *per se*", but adopting the Examiner's conclusion from that rejected premise it found that "they constitute an integral and inseparable part of the Respondent's otherwise illegal course of conduct and *when so viewed* they assume a coercive character which is not privileged by the right of free speech" (R. 855—Emphasis supplied).

The Petitioner quotes as findings of the Board itself many of the Examiner's unsound reasons in support of his finding that the letters were coercive, although the Board rejected that finding (Br. pp. 128-133). It says that that was the "context" which the Board "viewed" in deciding that the letters assumed a coercive character.

Counsel has outdone even the Examiner in casuistry and error. "When so viewed" the letters were themselves coercive. The quoted words refer and can only refer to the conclusion of the Examiner that the letters "were an integral and inseparable part of the Respondent's otherwise illegal course of conduct", which the Board adopted, although it rejected the premise on which it was based.

The Petitioner is *in extremis* when it resorts to such casuistry and misstatements. Whatever may be thought of the Board's illogical and circuitous reasoning, it certainly did not find as facts the reasons assigned by the Examiner for his finding that the letters were themselves coercive, which it rejected.

In any possible view, it stands established as matter of law by the Board's own finding that the letters were not in and of themselves coercive or evidence of an otherwise illegal course of conduct. The Board found that they assumed a coercive character only because they were an integral part of otherwise illegal conduct.

It appeared in the *Heinz* case (311 U.S. 514) that the Union had complained to the President of the Company of very serious coercive conduct of a Plant Superintendent and several Foremen, necessarily affecting an election and the organization of a Company Union, and that thereupon he directed them to desist. It was admitted that there was substantial evidence to support the Board's findings. This Court held that it was not enough for the President to stop such conduct when it was brought to his notice, but that having knowledge of it, he should have corrected its harmful effects either by informing the employees of his instructions to their Supervisors or in some other manner.

The facts of that case are so utterly dissimilar to the facts of the instant case that the Examiner did not venture to cite it in support of his ruling, although he must have been familiar with the decisions of this Court in labor

cases and he cited numerous decisions in support of other rulings.

Mr. Ferbert had in the most effective way informed each unlicensed seaman by letter that he was not to be threatened, intimidated or coerced by anyone and that it was his duty as well as his privilege to make up his own mind and to vote accordingly without fear of reprisals or hope of favor.

There was testimony, as this Court said, tending to show that the statements in the letters respecting so-called "rotary hiring" and the freezing of wages during the war emergency were misleading. The Union Vice-President, Lawrenson, supplied it, but he did not testify that they were misrepresentations, as the Examiner found and the Petitioner again states (R. 806, Br. p. 133). Although the Examiner also found that his testimony was uncontradicted (*id.*), it was contradicted by his own admissions on cross-examination (R. 118, 120, 121) and the truth and accuracy of the statements were proved by documentary evidence, the Union Contract (Bd. Ex. 8, R. 772) and by the statute *(Emergency Price Control Act of 1942, c. 26, 56 Stat. 23)*.

Independently of Section 8 of the Taft-Hartley Act, the employer has the right to use fair persuasion. Mr. Ferbert merely stated facts and plainly informed the men of their rights and duties, that their decision would not affect their position with the Company, and that no one must threaten them and appealed to them to be bound by the decision of the majority and to cooperate to achieve the objective for which they were all striving in aid of the war effort.

The Court of Appeals found on a critical analysis of the whole record that there was no evidence to support the finding that the letters were an integral part of a general course of coercive conduct (R. 878) and that the challenged statements were "squarely correct" (R. 879).

The Petitioner concedes, as it did below, that the statute immunizes those letters as far as any enforcement order is concerned (R. 875, Br. p. 136). That suffices, but they

needed no statutory immunity and the Court of Appeals decided independently of the statute that they were truthful and were not coercive.

C. ***There is not a scintilla of probative evidence that Shartle was discharged for Union activity.***

The Petitioner has cited none in its labored effort to prove the contrary (Br. pp. 99-106).

Shartle did not testify to a single fact even tending to show that he was discharged for Union activity, except that when he informed some of his shipmates that he was being fired for incompetence, they assured him that he was not incompetent but must have been discharged for Union activity (R. 173-4).

The Petitioner does not now rely on that testimony (Br. p. 116). It relies rather on its attempt to discredit the Respondent's witnesses (Br. pp. 99-112).

Shartle does not pretend that he ever brought his Union activities to the attention of the Master or First Mate who discharged him. Each testified that he did not know that Shartle was a Union organizer until after his discharge (R. 510, 678) and that he was discharged solely for incompetence (R. 502, 676).

He virtually admits that he carried on his unionizing activities surreptitiously (R. 171).

His incompetence was proved and found, but excused on the ground that he was not properly instructed by the Master and First Mate in order that they might have an excuse to discharge him (R. 837-8). There is not a particle of evidence to support that finding.

The winch incident is admitted by the Petitioner (Br. p. 99). That alone was sufficient ground to discharge him. His incompetence in handling the electric winch might have caused serious, if not fatal, injuries to deck hands but for the prompt intervention of a Mate. The Petitioner now admits his incompetence (Br. p. 20).

He was the only organizer out of 73, the only unlicensed

seaman out of 2,000, who was even alleged to have been discharged for Union activity.

The Petitioner attempted and now attempts to weaken the significance of that very important fact by finding and now asserting that Vogel, who succeeded Shartle as a Union organizer, was also discharged. Vogel and First Mate Dobson differ as to what was said when the latter witnessed a quarrel between Vogel and a seaman over the payment of Union dues (R. 215-6, 508-9). The conclusive fact is that Vogel admits that although the ship was then in port he remained on board and in the Respondent's employ and voluntarily quit at the end of the next round-trip, although the First Mate wanted him to stay on. (R. 224). The Petitioner's treatment of that incident is of a piece with its attempt to prove its charge by captious criticism of the Respondent's witnesses.

Incompetence proved, found and admitted, together with the undisputed testimony of the Supervisors who actually discharged Shartle, can be overcome, not by captious criticisms of the Respondent's witnesses, but only by probative evidence that the discharge was actually for Union activity.

The Examiner found that incompetent, inoffensive and ineffective Shartle was discharged because of his "outstanding position in Union activities aboard the ship" (R. 838), although aggressive Lee, Babin and Weissflog were not discharged, as they should and probably would have been but for Mr. Ferbert's instructions to the Supervisors.

That finding alone justified the denial of enforcement.

It thus stands on the record considered as a whole that the supposed evidentiary facts, which this Court said there was testimony tending to show and on which the ultimate conclusion of the Board was wholly based, were wholly inadequate to support that conclusion and that it is affirmatively established by undisputed and documentary evidence that the Respondent did not plan or engage in a continuous course of coercive conduct to defeat its employees' right of self-organization.

POINT II.

THE EXAMINER AND THE BOARD COMMITTED AT LEAST FIVE GRAVE ERRORS OF LAW.

Each of those errors was vital to the decision and alone justified a denial of enforcement.

1. **The Examiner did not venture to find contrary to undisputed and documentary evidence that strict neutrality was not enjoined on the Supervisors, but he disregarded Mr. Ferbert's instructions solely on the stated ground that they were not communicated to the unlicensed seamen (R. 830).**

There is no evidence and no claim that any officer of the Respondent had the slightest knowledge of a few sporadic incidents on seven out of seventy-three ships scattered over the Great Lakes.

Mr. Ferbert had the right to assume that his instructions would be observed, as indeed they were to an amazing degree; but he did take the pains to inform the unlicensed seamen in unmistakable terms of their right to choose their own representative without fear of reprisal or hope of favor.

2. **The Examiner found that the "coincidence in point of timing" of the so-called "verbal attacks" by Supervisors "with a crucial period of Union organization and their occurrence on every ship about which testimony was adduced disclose both a pattern and a design" (R. 827).**

With partisan witnesses on every ship, both Union organizers and Union members, the Petitioner must be presumed to have tendered all the evidence that it had. The paucity of incidents during a ten weeks' "crucial period of Union organization" and their occurrence on the few ships about which the Petitioner was able to adduce any testimony prove the absence of pattern or design.

The Examiner assigned the best reason he could think of to overcome the fact that no incident that could even be criticized occurred on 66 out of 73 ships during a ten

weeks' organizing campaign, in which imported professional organizers participated.

3. There was not a scintilla of probative evidence in support of the Examiner's finding that Shartle was discharged for Union activity, thereby discouraging membership in the Union and interfering with the employees' rights of self-organization (R. 838-9).

The testimony referred to by this Court as tending to show that fact was the hearsay testimony of Shartle himself that his shipmates so assured him when he informed them that he was being discharged for incompetence (R. 173). The Petitioner has not cited a particle of probative evidence to overcome the undisputed testimony that Shartle was incompetent and was discharged solely for that reason.

4. The Board not only adopted the above errors but independently made one equally serious.

It found contrary to the finding of the Examiner that the Ferbert letters were not illegal *per se*, but that they assumed a coercive character solely from being "an integral and inseparable part of the Respondent's otherwise illegal course of conduct" (R. 855).

That necessarily eliminates the finding of the Examiner as any support for the Board's order, and establishes that the letters were not evidence of the ultimate conclusion on which that order is based.

5. The Examiner found that the otherwise reasonable restraints imposed on Lee, Babin and Weissflog were unreasonable only because "the Respondent had no rule of general application prohibiting either solicitation or talking during working time" (R. 825-6).

The Examiner ruled in effect that no restraints could be imposed on any organizer to maintain discipline and proper operation in the absence of a rule applicable not only to all organizers but to all unlicensed seamen. That was manifest error.

But for that erroneous ruling, the erroneous finding of

the Board itself that the Ferbert letters assumed a coercive character from being an integral part of an otherwise illegal course of conduct, and the finding, without a shred of evidence to support it, that Shartle was discharged for Union activity, there would be nothing in the case that even smacks of coercion.

POINT III.

(Specifically answering Petitioner's Point III)

THE PETITIONER'S ATTACK ON THE DECISION OF THE COURT OF APPEALS IS WHOLLY UNWARRANTED AND ON GROUNDS PRESENTED NEITHER BY THE PETITION NOR BY THE RECORD.

The Court of Appeals did not set aside the Board's order, as stated in the headnote to Petitioner's Point III. It denied enforcement,—a very different matter, as the Petitioner is well aware.

A. *The Court of Appeals did not disregard the law of the case.*

The Petitioner is indeed hard pressed when it resorts to the contention that this Court has already decided the merits of this cause.

It reversed on a point of law not involving the merits, which had not been considered below, and remanded the cause for a consideration of the applicability and effect of the Administrative Procedure Act and the Taft-Hartley Act (337 U.S. 656).

In his preliminary statement of the case, the late Mr. Justice Rutledge said that there was testimony "tending to show" certain evidentiary facts on both sides of the case, without even mentioning the ultimate conclusion of fact to be drawn therefrom. That was quite sufficient for a reversal on a point of law not involving the merits.

In discussing the disposition to be made of the case after disposing of the point of law involved, the learned Justice parenthetically used the phrase "without doubting the existence here of evidence substantial enough under the Wagner Act to warrant the Board's findings". That is

not the way this Court expresses decisions which become the law of the case.

Although the Petitioner attempts to evade it, there cannot be the slightest doubt that the decisive question in this case is whether there is substantial evidence on the record considered as a whole that the Respondent "from on or about the 15th day of December, 1943, to on or about the 17th day of June, 1944, Respondent, through its agents and employees, engaged in a plan and continuous course of conduct" to coerce its employees in the exercise of their rights of self-organization (R. 4).

That is the ultimate question irrespective of whether or not the scope of judicial review has been enlarged by statute.

Whatever may have been in the minds of the Members of the Court, a decision *sub silencio* does not become the law of the case.

Although the Petitioner does not venture to set its argument forth in logical form, it is this:

1. This Court decided on the former appeal that there was substantial evidence under the Wagner Act to support the findings.

2. The scope of review under that Act has not been enlarged by statute.

Ergo, this Court must have decided that there was substantial evidence on the record considered as a whole that the Respondent had engaged in a planned course of coercive conduct to influence the election, although it did not say so.

We challenge both of the premises and maintain that on the record considered as a whole there is no substantial evidence to support the ultimate conclusion of fact, on which the Board's order is based, even under the Wagner Act, and that, if this Court would have decided that there was such evidence, had the point been involved and properly presented, such a decision would have demonstrated a crying need for the enlargement of the scope of review

of the decisions of administrative tribunals in the exercise of judicial power.

It suffices that the Court expressed no such decision. Whatever the individual members may have thought on the presentation then made, the real question involved was whether the Court of Appeals was justified in denying enforcement for unfairness.

We have now had a unanimous decision below based on a thorough review of the whole record and if the prior argument left any erroneous impressions in the minds of the Members of the Court, we respectfully ask for a reconsideration of them.

B. *The Court of Appeals did not substitute its judgment for that of the Board on any "disputed facts".*

It differed with the Board on the conclusion to be drawn from undisputed facts.

Under this subhead the Petitioner cites no instance in which the Court below substituted its judgment for that of the Board on any dispute of fact. There was no such instance.

We have never contended and do not now contend that the Congress has provided for a review *de novo* of the decisions of administrative tribunals.

C. *The Court below did not decide the case on the credibility of witnesses or reject the Board's findings in respect thereof.*

Under this subhead the Petitioner attempts to reargue the question decided in its favor on the former review. Its purpose is not far to seek.

The Court of Appeals decided:

1. Tha the finding that the Ferbert "letters formed an integral part of a general course of coercive conduct" was "supported by no evidence" (R. 878).

2. That "Lawrenson's testimony so far from being uncontradicted, as found by the Examiner, was contradicted

not only by the written Union contract, but by Lawrenson himself" (R. 879).

3. That the testimony respecting the instructions to the Supervisors was undenied and confirmed by letter to the Captains and that the Examiner's refusal to consider them because they were not communicated to the unlicensed seamen "was error as a matter of law" (R. 879).

4. That "Reading the case in the light of the whole record, we conclude that Shartle was discharged for cause and that the finding that he was discharged because of union activity is not supported by reliable, substantial, and probative evidence" (R. 882).

5. That "Based on the record in its complete setting, the other incidents held to constitute a general course of coercive action are at their worst sporadic cases of individual anti-union bias on the part of certain licensed employees. When viewed on the record as a whole, they are cases not of coercion but of mutual tension between aggressive organizers and the officials dealing with them" (R. 883).

6. That "It is undisputed that instructions had been given to the masters to permit organizing to be carried on as long as it did not interfere with discipline or proper operation. It was impossible for a home office to police 73 ships out on the Great Lakes and to frame rules which would take care of every situation. The employer's instruction was reasonable and required the captains to frame and enforce the proper rules. On the whole record the restrictions were justifiable" (R. 884).

7. And in conclusion "We think that to ignore the complete absence of union trouble on 66 ships where the positive instructions were that the rights of the men should be protected and where the basis of the holding against the employer is that it engaged in a general course of anti-union conduct, is to ignore the mandate of the two

statutes that decision shall be based upon 'the record considered as a whole' " (R. 884).

It did say that in view of the fact that Shartle had "denied the incident of the winch, which was found by the Examiner to have taken place * * * it is difficult to understand how Shartle's other testimony could be considered entirely credible".

Anyone who appreciates the imminent dangers involved in that incident will fully agree, but why talk about the credibility of witnesses on an issue on which there was not only no substantial evidence, but no probative evidence at all, not a particle, not even a scintilla, in support of the findings?

True, the Court did say that Lawrenson's testimony was contradicted by himself, though the Examiner found that it was uncontradicted, but that issue was decided on unquestioned documentary evidence and the statute.

True, in a footnote the Court quoted testimony of Seaman McGuinness in flat contradiction of Lee, which the Examiner flagrantly misquoted as supporting Lee, although he himself had elicited it (R. 883). Even the Petitioner felt it important to point out in another context that the Board deemed it prudent to correct that palpable error, or at any rate did so (Br. p. 28).

If judicial opinions are to be tested by the sort of captious criticisms indulged in by the Petitioner, few written by busy Judges would survive the test.

We venture to say that Judge Allen's exposition of the case has rarely been excelled for fairness, clarity, accuracy, thoroughness and cogency.

If the findings were substantial enough under the Wagner Act, it was indeed high time that the scope of judicial review be enlarged.

D. *The Court below did not deny enforcement of the Board's order because of the admission of "incompetent or hearsay evidence".*

Judge Allen did refer to Shartle's hearsay testimony as to the assurances given him by some of his shipmates

when he informed them that he was being discharged for incompetence and in the same context said that the finding was not supported "by reliable, substantial and probative evidence" (R. 882).

The Petitioner does not now claim that that testimony has the slightest probative effect.

In a footnote Judge Allen referred to other hearsay testimony which was admitted over objection and made the basis of important findings (R. *id.*).

We do not discuss that testimony because enforcement was not denied because of its admission.

E. ***Under this subhead with its three subdivisions, the Petitioner ignores the charge and the ultimate conclusion of fact on which the order is based and treats the case as though it were a case of isolated unfair labor practices, yet under the next subhead it admits that the Board found that the acts involved were in accordance with "Company policy" and "an integral part of a broad Company pattern of illegal conduct" (Br. pp. 120, 125-6).***

It surely does not contend that the Supervisors on these Lake freighters determined the Company policy. This point is an obvious attempt to divert attention from the decisive question in the case.

The Petitioner invokes its curious "law of the case" doctrine under this point and says that the question of the Respondent's responsibility "is foreclosed by the decision of this Court".

1. The question of the liability of the Respondent "for the illegal conduct of its ship officers even though it was unaware of and might have disapproved such conduct" does not arise in the instant case.

We have already shown that the facts on which the decision in the *Heinz* case was based are wholly lacking in the instant case (*ante*, p. 21).

That decision was that the Company had not discharged its full duty by merely directing its Supervisors to cease the very serious unfair labor practices in which they had been engaged.

We have no quarrel with the quotation on page 121 of the Petitioner's brief. It recognizes that the "principles of agency or *respondeat superior*" have no application.

In that case Supervisors had not only upbraided employees for attending Union meetings and threatened discharge for joining the Union, but had actively promoted the organization of a plant Union and participated in the enrollment of employees in it (311 U.S. 518), and all the President did on learning of such conduct was to direct the Supervisors to stop it.

If in the instant case Shartle had been discharged for Union activity, he could have been reinstated without loss of pay, even though his discharge was an isolated act and was without the authority or approval of the Respondent. That is an example of what the late Mr. Justice Stone meant by the language quoted by the Petitioner.

The question here is whether there was a planned course of coercive conduct to influence the election. The question of responsibility does not arise until that question is answered in the affirmative.

The question of the Respondent's knowledge or approval of the acts complained of is important on that question. A few isolated acts of Supervisors without its knowledge or approval have a far different aspect than they would have if done with its knowledge or approval.

Not only were the acts complained of in the instant case done without its knowledge, but it had taken affirmative and, as the facts show, very effective measures to assure a free and fair election by explicitly enjoining strict neutrality and non-interference with any Union activities and by plainly informing each unlicensed seaman personally of facts pertinent for him to know and of his right freely to choose his representative without fear or favor from any quarter.

The real question here is whether, in view of those affirmative measures taken by the Respondent, the acts and utterances of a few Supervisors in verbal exchanges with Union organizers constitute substantial evidence of a planned course of coercive conduct to influence the election.

The Petitioner is again hard pressed in comparing the authority of the Masters of Lake freighters with the sovereignty of ship Captains on the High Seas. This point would seem to be answered by the admission in effect under the next point that the acts involved were found by the Board to be pursuant to "Company policy".

2. Under this subhead the Petitioner appears to admit the necessity of showing that the few incidents complained of "were in fact an integral part of a broad Company pattern of illegal interference with the rights of employees".

Here will be found its only argument directly on the point. That is an obvious attempt to minimize, indeed to submerge, the decisive question in the case.

Its argument here is repetitious of assertions made elsewhere on other points and has already been adequately answered. Its main reliance is on the Ferbert letters and it repeats the assertions made elsewhere that the Board found as facts the reasons assigned by the Examiner for his finding that the Ferbert letters were coercive, although it expressly rejected that finding.

We have already exposed the error of those assertions (*ante*, pp. 21, 22).

3. Again the Petitioner completely misjudges the point involved.

It is whether evidence of a few scattered and unrelated incidents of the character involved is substantial evidence on the record considered as a whole of what the Petitioner itself now calls "a broad Company pattern", a designed and planned course of coercive conduct to influence an election on a fleet of 73 ships.

The question is not whether the Company is exculpated by the paucity of the Petitioner's evidence. It is whether on the whole record the Petitioner proved its charge and the ultimate conclusion of fact on which it based its order.

The precise number of the incidents involved and the precise number of ships on which they occurred is not as important as the nature of the incidents, the relations of

the actors, the setting and the circumstances under which they occurred and the paucity of the number in comparison with the whole.

In fact the number has been overstated. The ships of Captain Lawless must be eliminated since as already stated the incidents on them could not possibly have affected the election which had been certified by the Board long before they occurred. Three other ships must be eliminated, including the "Olds", since there is no proof that Shartle was discharged for Union activity and the other incidents claimed to have occurred on those ships were plainly inconsequential.

That leaves Lee, Babin and Weissflog. The restraints imposed on them must be eliminated, both because they were plainly reasonable and because of the manifest error of the Examiner in finding that they were unreasonable only because like restraints were not imposed on all by a general rule.

Lee had a heated argument with Captain Brinker, who had just been informed by two seamen that they were quitting the ship because of Lee.

Babin was ordered to stay out of the engine room by the Chief Engineer.

Weissflog was ejected from the mess hall and the men's sleeping quarters and was reprimanded for returning late to the ship from a leave.

Those incidents were not related.

The very fact that so few such incidents occurred during a ten-weeks' unionizing campaign, participated in by professionals, is proof of the effectiveness of Mr. Ferbert's instructions and, as the result, of the general recognition by the organizers of the fair treatment and liberty of action accorded them.

The Petitioner's case has to be judged by the entire picture presented, involving 73 ships scattered over the Great Lakes, 2,000 unlicensed seamen, including at least 73 Union organizers, of whom many were professionals, and 596 licensed seamen.

The incidents have to be judged by their nature, their setting, the relations of the actors and the circumstances under which they occurred.

So judged, the paucity and the nature of the incidents, about which the Petitioner was able to adduce any testimony, are wholly insufficient to overcome the force and effect of the undisputed and established facts or to prove "a broad Company pattern", a designed and planned course of coercive conduct to defeat the employees' right of self-organization, which was charged and found.

The excuse tendered by the Petitioner for the paucity of its evidence has already been considered. That excuse, even if it were valid, cannot obviate the lack of proof. It was not for the Respondent to prove a negative in the absence of affirmative proof.

It suffices to say of the Court decisions cited under this point that none of them has the slightest application.

POINT IV.

IT IS WHOLLY IMMATERIAL WHETHER REVIEWING COURTS POSSESSED THE INHERENT POWER WHICH THE STATUTES NOW REQUIRE THEM TO EXERCISE.

Certainly the Congress has expressly commanded such courts to review the whole record in determining the sufficiency of the evidence to support the findings of administrative tribunals. It is now admitted that the review provisions of the Administrative Procedure Act and the Taft-Hartley Act are applicable to this enforcement proceeding which was subsequent to the enactment of both statutes.

A review of the whole record is all the Respondent asks in the instant case. It cannot possibly matter then whether reviewing courts already possessed that power, except as bearing on the Petitioner's curious "law of the case" doctrine, which we trust we have disposed of under the preceding point.

However —

POINT V.

THE CONGRESS INTENDED TO AND IN FACT DID BROADEN THE SCOPE OF JUDICIAL REVIEW BY SAID ACTS.

The intent is admitted. That should determine the meaning of the words used to express that intent.

A. *The Administrative Procedure Act.*

Few acts have received more careful or longer consideration both in and out of Congress.

Two volumes, Senate Document No. 8, 77th Cong. 1st Sess. and Senate Document No. 248, 79th Cong. 2nd Sess., give the history of ten years of intensive study of the problem of Administrative Law and Proc dure, culminating in the enactment of that statute in 1946.

In 1937 the President submitted to the Congress the report of the committee appointed by him, saying: "The practice of creating independent regulatory commissions, who perform administrative work in addition to judicial work, threatens to develop a 'fourth branch' of the Government for which there is no sanction in the Constitution" (*id.* No. 248, p. 189).

The Attorney-General appointed a committee to study the problem. Before it reported, the Congress passed the Walter-Logan bill to remedy the evil about which all were concerned, but it was vetoed because that committee had not completed its work.

It submitted its report January 22, 1941. Three of the members, Mr. McFarland, the President of the American Bar Association, Dean Stason, and Mr. Vanderbilt, now Chief Justice of the Supreme Court of New Jersey, submitted "additional views", which were a scholarly exposition of the subject (*id.* No. 8, p. 203).

On the subject of Judicial Review, they said, among other things:

> "The present scope of judicial review is also subject to question in view of one of the prevalent interpretations of the 'substantial evidence' rule set forth

as a measure of judicial review in many important statutes. Under this interpretation, if what is called 'substantial evidence' is found anywhere in the record to support conclusions of fact, the courts are said to be obliged to sustain the decision without reference to how heavily the countervailing evidence may preponderate—unless indeed the stage of arbitrary decision is reached. Under this interpretation, the courts need to read only one side of the case and, if they find any evidence there, the administrative action is to be sustained and the record to the contrary is to be ignored. The courts, of course, should not weigh meticulously every bit of evidence. Indeed, such a requirement would prove a very undesirable burden. But the courts should set aside decisions *clearly* contrary to the *manifest* weight of the evidence. Otherwise, important litigated issues of fact are in effect conclusively determined in administrative decisions based upon palpable error" (Senate Document No. 8, 77th Cong. 1st Sess., pp. 210-211).

Many bill were introduced and there were many committee hearings. Based on all that had been done, and after consultations with interested parties in and out of official positions, companion bills were introduced in both Houses in 1944. That brought forth "a volume of further suggestions", with the result that a simplified and revised bill was introduced in January, 1945.

The House held hearings at which Mr. McFarland was heard (Senate Document No. 248, 79th Cong. 2nd Sess. pp. 72-86). Dean Stason was heard by the Senate in 1941. Administrative agencies were asked to submit their views. Further comments were received on the revised text, and, following further discussions, the Judiciary Committee of the Senate drafted a bill which was reported by its Chairman, Senator McCarran (*id.* No. 248, pp. 190-1).

In the course of that report, the following colloquy occurred between Senator George and the Chairman of the Committee:

"Mr. George. Mr. President, will the Senator yield?

"Mr. McCarran. I yield.

"Mr. George. The courts have many times held that if there is any evidence to sustain the finding of an administrative board under the statute, the courts have no power to intervene. If this bill should become a law would that rule, as heretofore construed by the courts, remain in effect?

"Mr. McCarran. The courts have given various constructions. The courts, in reviewing an order, are governed by the provisions of section 10 (e), which states the substantial-evidence rule. In other words, in some instances the courts have held that there must be substantial evidence. We are saying that there must be probative evidence of a substantive nature, and that even though the commission or bureau may take hearsay evidence in its hearings, it must have some probative evidence to sustain its finding.

"Mr. George. The point I wish to raise is that some of the acts of Congress, particularly those enacted in recent years, have led the courts to hold—and they so hold—that if there be any evidence to sustain the finding of a board or agency, the court has no power to interfere with it.

"Mr. McCarran. I would put it in this way—

"Mr. George. Would the enactment of this bill require some substantial or probative evidence to support such a finding?

"Mr. McCarran. Yes.

"Mr. George. Take the labor-relations cases. Senators are familiar with them. The circuit courts have frequently complained against what the Labor Relations Board did, but have said, 'We are powerless to interfere with it.' Would this bill change that rule, if the court were of the opinion that there was no probative evidence?

"Mr. McCarran. Yes; it would change that rule.

"Mr. George. I am pleased to hear it.

"Mr. McCarran. I thank the Senator."
(*id.* No. 248, pp. 321-2)

No branch of the subject received more consideration than that of "Judicial Review", if as much. Dean Stason's

able discussion before a Senate Committee in 1941 dealt wholly with that subject and completely demonstrated the need to expand the scope of judicial review *(Hearings on Administrative Procedure before a Subcommittee of the Committee on the Judiciary, United States Senate, 77th Cong. 1st Sess. on S. 674, S. 675 and S. 918, Part 3, pp. 1350-1360)*. But the Petitioner argues that all of that work merely resulted in the vain use of words and that the very courts, to whose laments on their lack of power to correct the grave abuses of judicial power by administrative agencies reference was made in the above colloquy, have lately said that they already had the power which the Congress has now required them to exercise.

The Petitioner quotes excerpts from the statements of Mr. McFarland and Dean Stason before the House and Senate Committees respectively.

Their whole statements are entirely consistent with what they and Judge Vanderbilt said in the above quotation from their report. The question was not how the term "substantial evidence" should be interpreted, but how it was being interpreted in actual practice. The statement of Dean Stason made in 1941 directly after the submission of the Attorney-General's report, together with the statement of Mr. McFarland in 1945 after the final revision of the bill, plainly show the intention of the Congress in requiring a review of the "whole record".

They had said that under one of the prevalent interpretations of substantial evidence "if what is called substantial evidence is found anywhere in the record to support conclusions of fact, the Courts are said to be obliged to sustain the decision without reference to how heavily the countervailing evidence may preponderate" (*id.* No. 8, pp. 210-211).

That was precisely the evil which the Act was intended to correct. Both the Senate and House reports said: "The requirement of review upon 'the whole record' means that the courts may not look only to the case presented by one party, since other evidence may weaken or even indisputably destroy that case" (*id.* No. 248, pp. 214, 280).

The "countervailing" evidence in the instant case "indisputably" destroys the probative effect on the controlling issue in the case of the testimony which this Court said tended to show certain facts, which, in fact, were only evidentiary.

The importance which even the Petitioner attaches to the "Additional Views and Recommendations" of the learned authors of the supplemental report is a recognition of the very great weight given that report by the Congress.

The context plainly shows that the recommendation that the courts set aside decisions "clearly contrary to the manifest weight of the evidence" did not mean that the courts should review the decisions of administrative tribunals *de novo* or decide on the mere weight of the evidence, as the Petitioner seems to suppose.

The Congress adopted that recommendation by requiring the courts to review the "whole record" in determining the sufficiency of the evidence without using words which might possibly encourage reviews *de novo*.

That required reviewing courts to decide according to countervailing evidence which preponderates over evidence "clearly contrary to the manifest weight of the evidence".

If there could be the slightest doubt of that intention, it is set at rest by the Taft-Hartley Act, the review provisions of which were plainly intended to strengthen those of the Administrative Procedure Act.

B. *The Taft-Hartley Act.*

Subsections (b), (c) and (e) of Section 10 of that Act are the important provisions upon which we rely.

Subsection (b) requires decisions to be based on legal evidence.

Subsection (c) requires the Board to act on the preponderating testimony.

Subsection (e) provides that the findings of the Board are conclusive if supported by "substantial evidence on the record considered as a whole".

Manifestly those three sub-sections of the same Section must be construed together.

The Petitioner says that (b) and (c) relate to the proceedings of the Board which had already been taken and that the procedural provisions of the Act are not retroactive. We rely on them only as explanatory of subsections (e) and (f) of the same section.

A learned Judge has said that those express commands were mere cautions (*Eastern Coal Co. v. N.L.R.B.* 176 F. 2d 131, 134). The express words of the statute and its entire legislative history refute that *dictum*.

This is an enforcement proceeding subsequent to the enactment of both statutes.

The Court below did not set "aside the Board's order" as the petitioner asserts for an obvious purpose (Br. p. 92). It denied enforcement (R. 884).

We rely on sub-sections (b) and (c) of Section 10 of the Act only as explanatory of the meaning of "substantial evidence on the record considered as a whole" in sub-section (e) of the same Section.

Surely the Congress could not have intended the Courts to accept less probative evidence than is required of the Board. So construed those words mean and can only mean the preponderating legal evidence in the whole record, unless the long and laborious labors of the Congress were entirely vain, as the Petitioner contends.

The House Conference Report (Report No. 510, 80th Cong. 1st Sess.) plainly shows that the Congress adopted the views of Messrs. McFarland, Stason and Vanderbilt on that subject.

We have shown under Point III, specifically answering Petitioner's Point III, that the Court below did not base its decision on conflicting testimony, did not substitute its judgment for that of the Board on "disputed facts", and did not deny enforcement because the Examiner had admitted incompetent and hearsay testimony, as the Petitioner contends in characteristic fashion, in attempting to divert attention from the decisive question in the case.

We maintain that in the instant case it is established as matter of law by the "whole record" that the testimony, which Mr. Justice Rutledge said "tended to show" certain evidentiary facts, has no probative force or effect on the

ultimate conclusion of fact, on which the Board's order is based, and that the undisputed and documentary evidence affirmatively establishes as matter of law that the Respondent did not engage in a planned and continuous course of coercive conduct to defeat its employees' right of self-organization, as charged and found by the Petitioner.

Indeed the instant case precisely illustrates in unusually striking fashion the distinction which the Congress intended to make between the mere weight of evidence and "substantial evidence on the record considered as a whole", meaning as we say the preponderating legal evidence.

The testimony of a few Union organizers may have been some, and we may even assume substantial, evidence that a few Supervisors were personally hostile to the Union and so expressed themselves in verbal conflicts or arguments with the organizers, but if it had any probative effect on the ultimate conclusion of fact necessary to support the order, such effect is destroyed by the undisputed and documentary evidence conclusively proving that the Respondent did not engage in any planned course of coercive conduct to influence the election.

Union Vice President Lawrenson's testimony may have been some evidence that the statements in the Ferbert letters respecting "rotary hiring" and the freezing of wages were misleading, though his admissions on cross-examination destroyed its substantiality, if it had any, and its probative effect, if it otherwise had any, was utterly destroyed by the Union contract and the statute which proved the complete truth of the statements.

Shartle's hearsay testimony of the friendly assurances given him by some of his shipmates, when he informed them that he was being discharged for incompetence, may be considered by some as some evidence that he was discharged for Union activity, but its very slight evidentiary value, if any, is utterly destroyed by the established fact that his incompetence was a menace to the safety and even the lives of other seamen and by the undisputed testimony of those who discharged him.

Thus the probative effect of the evidence on which the Petitioner wholly relies is utterly and completely destroyed.

Moreover it appears on the whole record in the instant case as matter of law that, being engaged in transporting iron ore vitally needed for the war effort which might have been seriously impeded by a work stoppage, Mr. Ferbert gave the Supervisors explicit instructions, both verbally and by letter, to maintain strict impartiality and not to interfere with any Union activities which did not interfere with discipline or proper operation, and that he took the further precaution to write letters personally to all unlicensed seamen, which the Board itself found were not in and of themselves unlawful, i.e., coercive, and in which he plainly informed them of their rights and that no one must threaten them, and appealed to them to accept the decision of the majority and to cooperate in the attainment of the objective in aid of the war effort, for which they were all striving.

The absence of any evidence of the slightest deviation from those instructions on all but a very few ships, the paucity of the incidents about which any evidence was adduced, we say about which any evidence could be adduced, the setting and surrounding circumstances of the few sporadic incidents complained of, and all the undisputed and established facts in the case confirm the conclusion to be drawn from the two cogent facts established as matter of law as above.

Furthermore, the vital findings are all vitiated by manifest errors of law.

The Petitioner appears to say that the Congress intended to expand the scope of review but did not know how to do so. It admits that the "House Conference Report" plainly shows an intention that the Courts should determine whether the requirements of sub-sections (b), (c) and (e) of Section 10 of the Taft-Hartley Act "have been met".

That was the report of the bill in the form in which it was enacted. It has much greater significance than statements made in debate even by the sponsors. But the Petitioner maintains that the members of the Committee and Senator Taft, the sponsor in the Senate, did not know what they were talking about.

For the convenience of the Court, we quote the pertinent statements more fully:

"(6) The House bill provided, in section 10 (b), that proceedings before the Board should be conducted, so far as practicable, in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure. The Senate amendment retained the language of the present act, which provides that the rules of evidence prevailing in the courts shall not be controlling. The reason for this provision in the House bill was explained in full in the committee report on the bill. If the Board is required, so far as practicable, to act only on legal evidence, the substitution, for example, of assumed 'expertness' for evidence will no longer be possible. The conference agreement in section 10 (c) contains this provision of the House bill.

"(7) In section 10 (c) the House bill provided that the Board should base its decisions upon the 'weight of the evidence'. The Senate amendment retained the present language of the act, permitting the Board to rest its orders upon 'all the testimony taken'. The conference agreement provides that the Board shall act only on the 'preponderance' of the testimony—that is to say, on the weight of the credible evidence. Making the 'preponderance' test a statutory requirement will, it is believed, have important effects. For example, evidence could not be considered as meeting the 'preponderance' test merely by the drawing of 'expert' inferences therefrom, where it would not meet that test otherwise. Again, the Board's decisions should show on their face that the statutory requirement has been met—they should indicate an actual weighing of the evidence, setting forth the reasons for believing this evidence and disbelieving that, for according greater weight to this testimony than to that, for drawing this inference rather than that. Immeasurably increased respect for decisions of the Board should result from this provision.

* * * * *

"(14) Under the language of section 10 (e) of the present act, findings of the Board, upon court review of Board orders, are conclusive 'if supported by evi-

dence'. By reason of this language, the courts have, as one has put it, in effect 'abdicated' to the Board (*N.L.R.B.* v. *Standard Oil Company,* 138 Fed. (2d) 885 (1943). See also: *Wilson & Co.* v. *N.L.R.B.* (126 Fed. (2d) 114 (1942), *N.L.R.B.* v. *Columbia Products Corp.* (141 Fed. (2d) 687 (1944), *N.L.R.B.* v. *Union Pacific Stages, Inc.* (99 Fed. (2d) 153). In many instances deference on the part of the courts to specialized knowledge that is supposed to inhere in administrative agencies has led the courts to acquiesce in decisions of the Board, even when the findings concerned mixed issues of law and of fact (*N.L.R.B.* v. *Hearst Publications, Inc.,* 322 U.S. 111; *N.L.R.B.* v. *Packard Motor Car Co.,* decided March 10, 1947), or when they rested only on inferences that were not, in turn, supported by facts in the record (*Republic Aviation* v. *N.L.R.B.,* 324 U.S. 793; *Le Tourneau Company* v. *N.L.R.B.,* 324 U.S. 793).

"As previously stated in the discussion of amendments to section 10 (b) and section 10 (c), by reason of the new language concerning the rules of evidence and the preponderance of the evidence, presumed expertness on the part of the Board in its field can no longer be a factor in the Board's decisions. While the Administrative Procedure Act is generally regarded as having intended to require the courts to examine decisions of administrative agencies far more critically than has been their practice in the past, by reason of a conflict of opinion as to whether it actually does so, a conflict that the courts have not resolved, there was included, both in the House bill and the Senate amendment, language making it clear that the act gives to the courts a real power of review.

"The House bill, in section 10 (e), provided that the Board's findings of fact should be conclusive unless it appeared to the reviewing court (1) that the findings were against the manifest weight of the evidence or (2) that they were not supported by substantial evidence.

"The Senate amendment provided that the Board's findings with respect to questions of fact should be conclusive if supported by substantial evidence on the record considered as a whole. The provisions of section 10 (b) of the conference agreement insure the Board's receiving only legal evidence, and section 10 (c) insures its deciding in accordance with the pre-

ponderance of the evidence. These two statutory requirements in and of themselves give rise to questions of law which the courts will hereafter be called upon to determine — whether the requirements have been met. This, in conjunction with the language of the Senate amendment with respect to the Board's findings of fact — language which the conference agreement adopts — will very materially broaden the scope of the courts' reviewing power. This is not to say that the courts will be required to decide any case de novo themselves weighing the evidence, but they will be under a duty to see that the Board observes the provisions of the earlier sections that it does not infer facts that are not supported by evidence or that are not consistent with evidence in the record, and that it does not concentrate on one element of proof to the exclusion of others without adequate explanation of its reasons for disregarding or discrediting the evidence that is in conflict with its findings. The language also precludes the substitution of expertness for evidence in making decisions. It is believed that the provisions of the conference agreement relating to the courts' reviewing power will be adequate to preclude such decisions as those in *N.L.R.B.* v. *Nevada Consol. Copper Corp.* (316 U.S. 105) and in the *Wilson, Columbia Products, Union Pacific Stages, Hearst, Republic Aviation,* and *LeTourneau,* etc., cases, supra, without unduly burdening the courts. The conference agreement therefore carries the language of the Senate amendment into section 10 (e) of the amended act." *(Vol. 1, Legislative History of the Labor Management Relations Act, 1947, pp. 557-560).*

In the Senate, Senator Taft, the Chairman of the Committee on Labor and Public Welfare, in submitting the majority report of the Committee had said:

"The bill makes a change in the provision regarding court review of National Labor Relations Board decisions. The present rule in the law is simply that any decision supported by evidence shall be final as to the facts, and the result has been that as a practical matter it is almost impossible for a court to reverse the National Labor Relations Board.

"Under this proposal, it is said that the finding of the Board with respect to questions of fact, if sup-

ported by substantial evidence on the record considered as a whole, shall be conclusive.

"In the first place, the evidence must be substantial; in the second place, it must still look substantial when viewed in the light of the entire record. That does not go so far as saying that a decision can be reversed on the weight of the evidence. It does not go quite so far as the power given to a circuit court of appeals to review a district-court decision, but it goes a great deal further than the present law, and gives the court greater opportunity to reverse an obviously unjust decision on the part of the National Labor Relations Board." (Vol. 2 *id.* p. 1014.)

The Petitioner accepts the definition of "substantial evidence on the record considered as a whole" as evidence which not only is itself substantial but still looks substantial "when viewed in the light of the entire record".

It applies equally to "substantial" evidence on a "review of the whole record".

We know of no better definition in plain and simple words of "preponderating" evidence.

The conference accepted the Senate provision of Section 10 (e) in respect to which Senator Taft had made that concededly accurate statement and also the House provisions of Sections (b) and (c) requiring decisions to be based on the preponderating legal evidence.

Plainly, those three subdivisions thus tied together "very materially" broadened "the scope of the Court's reviewing powers", as the Conference Report had said.

The net effect of the compromise was that decisions of reviewing courts as well as those of the Board have to be based on the "preponderating legal evidence" rather than on the mere weight of evidence. Thus, the risk of reviews *de novo* was avoided.

Evidence which is "substantial" and still looks substantial "when viewed in the light of the entire record" would seem to be preponderating evidence even if the bill finally agreed to had not expressly required decisions of the Board to be based on the preponderating testimony. Mani-

festly, "substantial evidence on the record considered as a whole" could not have been intended to mean less.

We respectfully ask for an affirmance of the unanimous decision below.

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